[redacted]

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905.

ST. LOUIS DRESSED BEEF AND PROVISION COMPANY,
Plaintiff in Error,
v.
MARYLAND CASUALTY COMPANY,
Defendant in Error.
No. 197.

STATEMENT, BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

The questions hereby certified to this Honorable Court, as presented by the assignment of errors in the case before the Court of Appeals for the Eighth Circuit, and upon which said court desires the instruction of the Supreme Court of the United States, are six in number.

We shall avail ourselves of the privilege of filing suggestions in support of the answer which we deem correct, and herewith for that purpose submit this, our brief.

The judgment, which the writ of error challenges, sustained a demurrer to the petition and dismissed the action. The petition declares upon a contract of insurance.

This contract of insurance, when stripped of all im-

material provisions, may be reduced to the following, in substance:

The insurer agrees that, in consideration of a premium paid, it will indemnify the assured for a term of one year, beginning on the 5th day of July, 1900, at noon, and ending on the 5th day of July, 1901, at noon, standard time, at the place where this policy has been countersigned:

> "This policy shall only cover loss sustained by and liability for any claims against the assured as a result of the risk, specified in the contract or contracts hereto attached, and is issued and accepted upon the condition that all the provisions printed on the slip or slips attached to this policy are accepted, and shall be fulfilled by the assured as part of this contract as fully as if they were recited at length over the signatures hereto affixed."

On the slip attached to the policy specifying the risks were the following provisions:

> "Against loss from common law or statutory liability.
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> "For damages on account of bodily injuries, fatal or non-fatal, accidentally suffered by any person or persons, and caused through the negligence of the assured, by means of the horses or vehicles in his service and the use thereof, as described in the application, and while in charge of the assured or his employes.
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> "Clause 'A.' The company's liability for an accident resulting in injuries, or in the death of one person, is limited to five thousand dollars ($5,000.-00); and subject to the same limit for each person, the total liability for any one accident resulting in injuries to, or in the death of, any number of persons, is limited to ten thousand dollars ($10,000.-00)."

> "This insurance is subject to the following conditions, which are to be construed as conditions precedent to this contract:
>
> "1. The assured, upon the occurrence of an accident, shall give immediate notice thereof in writing, with full particulars, to the Home Office of the

company in Baltimore, Md., or to its duly authorized agent. He shall give like notice, with full particulars, of any claim which may be made on account of such accident.

"2. If, thereafter, any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy, immediate notice thereof shall be given to the company, and the company will defend such proceeding in the name and on behalf of the assured, or settle the same at its own cost, unless it shall elect to pay the assured the indemnity provided for in clause 'A' of special agreements, as limited therein.

"3. The assured shall not settle any claim except at his own cost, nor incur any expense, nor interfere in any negotiations for settlement or in any legal proceeding, without the consent of the company previously given in writing; but he may provide at the time of the accident, such immediate surgical relief as is imperative. The assured, when requested by the company, shall aid in securing information and evidence, and in effecting settlements, and in case the company calls for the attendance of any employee or employees as witnesses, at inquests and in suits, the assured will secure his or their attendance, making no charge for his or their loss of time.

"8. No action shall lie against the company as respects any loss under this policy, unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue. No such action shall lie unless brought within the period within which the claimant might sue the assured for damages, unless at the expiry of such period there is such an action pending against the assured, in which case an action may be brought against the company by the assured within thirty days after final judgment has been rendered. and specified, as above. In no case, except that of minors, shall any action lie against the company after the expiration of six years from the date of the given injuries or death.

"The company does not prejudice by this clause any defense to such action which it may be entitled to make under this policy."

On May 25th, 1901, plaintiff became liable for damages on account of bodily injuries accidentally suffered by Mrs. Nellie Heideman and caused through the negligence of plaintiff, by means of a horse and vehicle in its service and in the use thereof, while in charge of one John Berry, who was one of plaintiff's employees. Plaintiff immediately gave the defendant notice of the accident and of the fact that Nellie Heideman made a claim against the plaintiff for damage on account of the bodily injuries she had suffered from the accident, and that Henry Heideman, her husband, also made a claim for damages against it for the loss of the services of his wife, and for expenses of physicians and nurses which resulted to him from her bodily injuries.

Upon August 16th, 1901, the defendant notified the plaintiff that it denied that it was liable to it on account of the damages resulting from the accident under the policy, because, as it alleged, the driver of the plaintiff's wagon was not an employee of the plaintiff. But the fact was, that this driver was an employee of the plaintiff, and the accident and damages were covered by the policy.

On November 23rd, 1901, Nellie Heideman sued the plaintiff for ten thousand dollars on account of the bodily injuries to her caused by the negligence of plaintiff's driver and by the accident; and Henry Heideman brought an action against it for three thousand dollars damages, which he alleged he sustained through the same cause.

On November 29th, 1901, the plaintiff, in writing, notified the defendant of the comencement of this suit and requested it to undertake the defense of said suits, as its said policy provided it would do; but the defendant declined to undertake the defense, upon the alleged ground that its policy did not cover the accident or the

claims, while the fact is, that it covered both. The injuries to Mrs. Heideman were very serious, and the plaintiff was liable for damages in each of the suits; it feared heavy damages if the actions were permitted to proceed to trial. That it, thereafter, negotiated for a compromise, and prior to effecting the compromise served, on defendant a written notice, notifying it of the terms of settlement offered by said Nellie Heideman and Henry Heideman for the injuries sustained and damages suffered by them respectively, as aforesaid, and that plaintiff proposed to accept said settlement and pay said amounts and to hold defendant responsible for such payment under its policy. That defendant interposed no objection to said proposed settlement, relying upon its said disclaimer of any liability under said policy by reason of its said alleged claim that the driver of said wagon was not in the employ of plaintiff herein. That, thereafter, on April 15th, 1902, plaintiff compromised the suits brought and paid Mrs. Heideman two thousand dollars damages and her husband five hundred dollars damages on account of the injuries caused by the accident and the negligence of its driver.

It is further stated that by reason of defendant's failure and refusal to defend said action, brought by said Nellie Heideman, and Henry Heideman, plaintiff was obliged to, and did, defend said actions and employed counsel for said purpose at an expense of two hundred and fifty dollars, and that said employment of counsel was reasonably necessary and that said sum of two hundred and fifty dollars is the reasonable value of said services so performed.

The United States Circuit Court of Appeals, with this state of facts before it, certifies the following questions to this court:

Questions Certified by United States Circuit Court of Appeals, Eighth Circuit, to Supreme Court of the United States.

1. Did the denial of all liability by the assurer and its refusal to defend the suits in the name and on behalf of the assured, as provided by paragraph 2 of the policy, constitute such a breach of the contract on its part that it relieves the assured from its agreement in paragraph 3 that it would not settle any claim, except at its own cost, without the consent of the assurer previously given, in writing, and from the provision of paragraph 8, that no action should lie against the assurer as respects any loss unless for loss actually sustained and paid by the assured in satisfaction of a judgment after trial of the issue?

2. Were the provisions of paragraphs 3 and 8 of the policy that the assured should not settle any claim except at its own cost, without the consent of the assurer, previously given in writing, and that no action should lie against the assurer as respects any loss under the policy unless brought by the assured to reimburse it for loss actually sustained and paid by it in satisfaction of a judgment after trial of the issue, waived by the assurer's denial of liability under the policy and by its failure and refusal to defend the suits against the assured according to the provision in paragraph 2?

3. Did the compromise by the assured of the suits against it, after the assurer denied its liability and refused to defend them and the payment by the assured of the damages claimed of it, pursuant to the compromise, without the consent of the assurer and without the rendition of a judgment or the trial of the issues, prevent the assured from securing any recovery of the assurer upon the policy on account of the negligence, accident and injuries described?

4. Considering the terms of the policy, is the right of the assurer to insist upon the condition of paragraph 8, respecting the rendition of judgment after trial and its satisfaction by the assured, dependent upon the assurer's defense of the action against the assured according to the provision in paragraph 2?

5. Considering the terms of the policy, is the assurer's denial of liability, under the policy a waiver of the condition in paragraph 8, respecting the rendition of judgment after trial and its satisfaction by the assured?

6. Under the terms of the policy, may the liability of the assured to the injured person and the extent of that liability be litigated in the first instance in an action between the assured and the assurer where the assurer was denied its liability under the policy, and has refused to defend an action brought against the assured by the injured person?

In order to properly answer all of these questions, it may simplify matters first to decide whether or not this contract of insurance is one in which the insurer agreed to indemnify the assured against loss or damages *only*, or whether it not only agreed to indemnify against loss or damage, but *also* agreed to indemnify the assured against *liability* for loss or damages, for the reason that if this contract be construed to be one in which the insurer agreed to indemnify against liability for damages or loss, there can be no question but that the demurrer to plaintiff's petition should have been overruled, the allegations of the petition being that the plaintiff became liable in damages to the injured person on account of the accidental injury to Nellie Heideman through the negligence of one of its employees while in charge of one of its wagons.

I.

It appears from the provisions of the policy, taken as a whole, that the liability of the insurer first attaches under the policy upon receiving notice of the happening of an accident, and of the claim of the injured party for damages occasioned thereby; and that prior to the beginning of any suit by the claimant, the insurer has reserved to himself the exclusive right to negotiate for

a settlement, or to settle the claim, prohibiting the assured from settling the claim except at his own cost, and from incurring any expense other than to provide such immediate surgical relief as is imperative at the time of the accident, and from interfering in any negotiations for a settlement, without the consent of the insurer peviously given in writing, and requiring of him, upon request, that he shall aid the insurer in securing information and evidence, and in effecting settlements, and that, thereafter, in the event that the claimant brings suit against the assured to enforce his claim for damages on account of an accident covered by the policy, that the insured shall give immediate notice thereof to the insurer; whereupon, the insurer will do one of two things, under his right of election: either pay the assured the indemnity provided for in clause "A" of special agreements, as limited therein, or defend against such proceeding in the name and on behalf of the insured, or settle the same at its own cost; and again, in the event that it elects to defend, it is provided that the assured shall not interfere in any negotiations for a settlement or in any legal proceeding without the consent of the company previously given in writing, and shall be bound, upon request of the insurer, to aid in securing information and evidence, and in effecting settlements, and in the event that the insurer calls for the attendance of any employee or employees as witnesses in said suit, that the assured will secure his or their attendance, making no charge for his or their loss of time.

From which we see from the very terms of the instrument itself that it is not merely an agreement to indemnify the plaintiff against loss or damage, but that in case of an accident of such a character as to render the insured liable to the claimant, the insurer agrees to assume the liability and to take charge of all proceed-

ings therein, unless it elects to take advantage of the provisions of clause "A." And if such a construction be adopted, and this policy be declared to be a contract to indemnify against liability or loss or damage, clause "8" should be disregarded and left out of consideration, for the reason that it can have no bearing, unless the contract is construed to be one of indemnity against loss, and then only to indemnify against such a loss as is provided under clause "8," namely, a loss actually sustained and paid by the assured in satisfaction of a judgment after trial of the issue.

This question of the difference between contracts of indemnity against loss and indemnity against liability for loss, has never been presented to this court for decision, to our knowledge. It has, however, been presented to several of the Supreme Courts of the different States.

In the case of Fenton v. Fidelity and Casualty Company, 36 Oregon, 283, Mr. Justice Bean, after stating the facts, delivered the opinion of the court:

> "There is a distinction made by the authorities between a contract of indemity against liability for damages and a simple contract of indemnity against damages. In the former case it has very generally been held that an action may be brought and a recovery had as soon as the liability is legally imposed, while in the latter case there is no cause of action until there is actual damage.
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> "If, therefore, the policy, upon which this action is based, is a mere contract of indemnity, the payment by the Mill Company of the liability incurred by it for the services of the plaintiff, is a condition precedent to the right of recovery. If, on the other hand, the contract is one of indemnity against liability, a cause of action accrued thereunder as soon as the liability of the Mill Company to the plaintiff attached.
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> "Upon this question the policy must speak for itself; and its several provisions, in our opinion, indicate quite clearly that it is not merely an agree-

ment to indemnify the Mill Company against such damage as it may suffer on account of injuries to its employees, but that in case of an accident to an employee, whereby a cause of action arises against it the Insurance Company will assume the liability on account thereof. By the express terms of the contract it agrees to indemnify the Mill Company, not only against actual damage, but against liability for such damage. The policy provides that the defendant shall be immediately notified of an accident and shall, thereafter, have exclusive right and power to settle and adjust any claim therefor, and control all legal proceedings in connection therewith. And the Mill Company is prohibited from settling any claim or incurring any expense without the written consent of the Insurance Company, except that in case of an accident it may provide such immediate surgical relief as may be imperative.

"It would, in our opinion, be inconsistent with the terms and provisions, as well as the object and purpose of the policy, to hold that the assured must actually pay and discharge the claim or demand made against it on account of the injury to one of its employees, as a condition precedent to the maintenance of an action on the policy.

"This is the interpretation given to a similar contract by the Supreme Court of Minnesota, in the case of Anoka Lumber Co. v. F. &. C. Co., 63 Minn., 286, and is in harmony with the construction of policies substantially the same by the courts of other States." * * *

"If, however, the meaning of the policy is in doubt, and its language is fairly and reasonably susceptible of two constructions, one favorable to the assured and the other to the defendant, the one is to be adopted which is the most favorable to the assured. This is the universal ruling in the construction of insurance policies, because they are drawn by the attorneys, officers and agents of the company, and it is but fair that if there should be any ambiguity or uncertainty in the language used it should be construed most strongly against the company."

Citing, among other cases:

American Surety Co. v. Pauley, 170 U. S., 133.

The provisions of the policy in the above case material to the question were almost identical with those of the policy now brought before the court. It provided:

> "In consideration of the warranties made in the application for this policy, and of $480.00, the F. & C. Co., of New York, hereinafter called 'The Company,' does hereby agree to indemnify the W. S. M. L. & M. Co., of Portland, hereinafter called 'The Assured,' for the term of twelve months * * * against liability for damages on account of fatal or non-fatal injuries accidentally suffered by an employee or employees of the assured * * * subject to the following agreements and conditions."

The first of these conditions limited its liability for an accident resulting in injuries to or death of one person to five thousand dollars, and its gross liability for a casualty to ten thousand dollars; the second required that, upon the occurrence of an accident and upon receipt of information of a claim on account of the accident, notice in writing should immediately be given the company; the third, that if thereafter any legal proceedings are taken to enforce the claim for damages on account of such accident, that the company will defend the same at its own cost and in the name and on behalf of the assured; the fourth prohibited the assured, except at its own cost, from settling any claim or incurring any expenses, interfering in negotiations for settlement, or in any legal proceedings, without the consent of the insurer, and requiring that the assured shall render aid in securing information and evidence and in effecting settlements; it permitted him to provide such immediate surgical relief as should be imperative.

It appeared that an employee of the insured was seriously injured while employed in its service, and that, immediate surgical relief being imperative, plaintiff, a physician and surgeon was employed by the insured to attend the injured man. Shortly thereafter the insured

became insolvent and its property went into the hands of a receiver, who, in pursuance of an order of court, assigned and transferred to the plaintiff its claim against the defendant for the liability incurred in providing immediate surgical relief for the injured employee, and he accepted the same in full payment and satisfaction of his claim against the Mill Company, and, thereupon, brought this action directly against the defendant to recover the sum of $150.00 alleged to be the reasonable value of his services. The insurer alleged the insolvency of the insured and that it had not paid, and would not be able to pay, any portion of plaintiff's claim. A demurrer was sustained to the new matter, from which the defendant appealed.

Again, in the case of Hoven v. Lake Superior Iron and Steel Co., 93 Wisc., 201, Marshall, J., delivering the opinion, decided that the policy of insurance, which is nearly identical with that now in suit, was a contract to indemnify the assured against liability, and not against damages only, and is illustrative of the principle of distinction involved.

In all of these cases, however, the question of interpretation turned upon whether or not it was essential to allege and show that an actual loss had been sustained and satisfied by a payment to the injured person; and in all of them it was held that since the contract was one against liability for loss, that the cause of action against the insurance company accrued as soon as an accident covered by the policy occurred and a claim thereunder was made by the injured party against the insured; the defense of the company being that their policy was one to indemnify against loss and until payment of the loss had been made by the assured the liability of the insurer did not attach.

II.

In the event that this court is of the opinion that this contract, when properly interpreted, is one wherein the insurer agreed to idemnify only against loss sustained and paid, then the effect the denial of liability by the insurer and its refusal to defend in the name and on behalf of the assured, as provided by paragraph 2 of the policy, in the absence of an election to pay the indemnity provided under clause "A," is the key to the answer to all of the questions presented to this court for decision, and constitutes a breach of its contract and released the insured from its agreement in paragraph "3" and from the provisions of paragraph "8." Whatever loss has been sustained has been paid. The amount of the loss to the assured can not be more than three thousand dollars, which it has paid; it may be less. The fact that it has paid $3,000,00 to compromise the loss does not fix the amount; it establishes the fact that all the loss which the complainant was liable for, or has sustained, has been paid. A judgment against an indemnitee, after notice to the insurer to defend suit, is conclusive of the amount and liability.

16 Am. & Eng. Ency., 180, Note 4, and cases cited;
Showers v. Wadsworth, 81 Cal., 270.

Such a judgment, without any notice to an indemnitor, is presumptive evidence of liability and its amount only.

16 Am. & Eng. Ency., 180, Note 5;
Kansas City, etc., R. Co. v. Southern Ry. News, 151 Mo., 373, 391;
Laing v. Hanson, (Texas), 36 S. W., 116, 118.

The defense of the Insurance Company is, in substance, that not only shall a loss be sustained and paid, but that the proof of loss shall be the one provided in the policy, and that this proof shall consist of a judgment against the assured after trial of the issue.

Our answer to this is, that the provisions of Section "8" were waived by a denial of all liability and the refusal to defend the suit, or by the breach by the insurance company of the provisions of Section "2" that it will defend against such proceedings in the name and on behalf of the assured, or settle the same at its own cost, unless it shall elect to pay the indemnity provided in clause "A." That this provision for the judgment and its payment is of the same nature and effect as the provision in fire insurance policies for a determination of amount and liability by arbitration, and that such arbitration "shall be a condition precedent to any right of action in law or in equity to recover for such loss." Such contracts are valid and binding as long as the indemnitor proceeds in accordance with them, and does not deny its liability.

Hamilton v. Ins. Co., 136 U. S. 242, 252.

But they are ineffective and are waived when the insurer denies all liability.

Weiner v. Fire Ins. Co., 153 Mass., 235, 238;
Savage v. Phoenix Ins. Co., 12 Mont., 458;
Pensel v. Home Ins. Co., 3 Wash. St., 485.

That the provisions that the Insurance Company shall have immediate notice of any suit brought against the assured—that it will defend the proceeding in the name of the assured, or settle it, or pay the indemnity provided in clause "A"—together with the provision prohibiting the assured from settling or incurring expense, or interfering in any negotiations or settlement —and that no action shall lie against the company

until after judgment and payment thereof—are all for the benefit of the Insurance Company, and for the purpose of enabling it to determine for itself the amount of the liability, and that this is the true effect, purpose and intent of these provisions, is shown by the last clause of subdivision "8," wherein it expressly recites that it *shall not prejudice any defense to the action which it may be entitled to make by insisting upon the provisions of clause 8.*

Are these provisions anything more than a mode of proof of the liability which is to be evidenced by the final judgment, if this mode is pursued, in the same way that proofs of loss, awards of arbitrators and appraisals, and the usual provision in insurance policies that no action shall be maintained until such proofs, awards and appraisals are made, prescriptions of the manner of proof in ordinary insurance against fire or death? Provisions for the mode of proof in ordinary fire and life insurance are waived by a denial of liability. Are the provisions of this policy with reference to the mode of conducting the suit against the insured and the judgment and payment thereof anything more than a method of proof which is waived when the company denies its liability and refuses to follow that mode?

In Ross v. American, etc. Ins. Co., 56 N. J. Eq., at page 55, where the character of a judgment against the insured under these provisions is under discussion, Vice Chancellor Pitney said:

> "The recovery of the judgment against the insured by the injured party is not the injury against which the insurer insures him, but it is the liability for the consequences of the accident against which he is insured, and of which liability the judgment is a mere test or mode of proof. In fact the recovery of the judgment is a mere mode by which the insured proves to the insurer that the

intrinsic character of the accident was such that he was liable for the consequences of it. In this respect the judgment resembles the proof of loss to be furnished to an ordinary insurer against fire or shipwreck before action brought, or proof of death in case of life insurance. These are usual prerequisites to liability to action, but do not constitute the cause of action, and in the case of a judgment against the party insured under one of these policies for damages for the result of the accident, the liability, though legally fixed at that time, relates back to the accident itself. In contemplation of law, the insured either was or was not, from the first, liable for the consequence of the accident, and the presumption is that the result of the investigation of the facts was never doubtful from the first and always sure to result according to the actual fact, so that the recovery of the judgment can not be held or treated in the law as a contingency which may or may not happen, but a mere judicial ascertainment of the intrinsic character of the occurrence which determined the liability of the insured. Again, another office of the judgment is to ascertain by the only legal mode the extent of the damages, precisely as the extent of the damages in case of fire or shipwreck is to be ascertained by an inquiry undertaken before payment."

In the case from which this quotation was taken there had been no denial of liability, and consequently this provision of the contract remained in force and prescribed the only legal mode of ascertaining the extent of the damages, in the same way that an award or appraisal in an ordinary insurance policy is the only legal mode of ascertaining the damages from a loss, and conditions the right of action in the absence of denial of liability, or other waiver.

When a denial of liability is made in the case of a loss by fire, the person insured may prove his loss by evidence in court without the award or appraisal speci-

fied in the contract. So the beneficiary of a life policy may recover without furnishing proof of death in case of a denial of liability.

The only reason for and value of the provision in this policy, that the proof of loss shall be evidenced by a judgment after trial of the issue, is that it may give the insurer an opportunity to cut down the amount of recovery, since under the provisions of the policy, he, the insurer, is to conduct the defense and to be the real party defendant to the action. Upon the refusal of the insurer to conduct the defense and its denial of liability, we submit that it is estopped from insisting upon the mode of ascertaining the damages prescribed by the policy.

In discussing the rights and duties of the insured under the provisions of a policy regarding the defense of suits, the Court of Appeals of Kentucky says, in the case of Southern Ry. News Co. v. Fidelity & Casualty Co., 83 S. W., 620, 622:

> "The appellant, after having notified the appellee that the liability had been incurred by reason of the injury, was bound to make the loss as small as possible so far as is reasonable, although appellee did not avail itself of the provision in the policy to personally conduct the defense to the suit. Appellant might have compromised the claim so long as it acted in good faith and with reasonable prudence, such as a prudent person similarly situated would have done for himself. This would have bound appellee to pay to it the loss actually sustained by the compromise. The compromise, if one was effected as is charged, may have been taken into consideration as evidence of the actual loss sustained, but, of course, not conclusive evidence of it. Other evidence might also be admitted to show whether it was or was not a judicious and fair settlement."

This contract of insurance contained mutual cove-

nants. The insurance company had the right to defend the suits. The assured had agreed to keep its hands off, and that it would not compromise, settle or pay until the suits so defended by the insurance company went to judgment, and that it should not recover against the insurance company until it had paid such judgments. When the insurance company denied all liability and declined to defend the suits, it thereby waived the provisions of the policy regarding the mode of determining the liability and the damages, and left the assured with the right to settle or compromise the claims against it or to contest them, as it saw fit.

Insurance policies generally contain the provision that no action shall be maintained against the insurance company upon any claim for damages by fire or by death, unless the proofs specified in the policy have been prepared and furnished to the companies, unless, in fire cases, the damaged property has been appraised, and unless, in many cases, the questions have been referred to arbitrators and an award has been secured, and nearly all of them provide that no action shall be maintainable and no claim shall be payable until sixty days after the proofs have been furnished; but (1) a denial of all liability waives the provision that no action can be maintained until sixty days after proofs of loss, and makes it available immediately.

Tayloe v. Ins. Co., 9 How., 390, 403;
California Ins. Co. v. Gracey, 24 Pac., 577, 578;
4 Joyce on Insurance, Section 3211.

(2.) A denial of liability waives the provision requiring proof of loss by fire and avoids the provision that no action shall be maintained until such proofs have been furnished.

Knickerbocker Ins. Co. v. Pendleton, 112 U. S., 696, 710;
4 Joyce on Insurance, Section 3257.

(3.) The provision in a policy—"that no suit or action against this company for recovery of any claim for loss by virtue of this policy shall be sustained in any court of law or chancery unless award of loss by arbitration as herein provided for, shall have been first returned," is waived by a denial of all liability and an action is then at once maintainable.

Bailey v. Aetna Ins. Co., 46 N. W. Wis., 440.

Beach says that the general rule is that arbitration, appraisal and all other acts which are made conditions precedent to an action upon a contract of insurance are waived by a denial of all liability.

Beach on Insurance, Section 1244.

This is an insurance contract. It is governed by the ordinary rules which control contracts of insurance, and we submit that the mode of ascertaining the amount of loss and the liability was a provision expressly stated in the policy to be a condition precedent, and is waived by a denial of all liability.

We submit, therefore, in answer to the questions that the right of action of plaintiff in error against defendant in error should be sustained, and that the demurrer interposed in the court below should be overruled.

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